

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Market Test of Experimental)
Product—Gift Cards)

Docket No. MT2011-2

RESPONSE OF THE PUBLIC REPRESENTATIVE TO MOTION OF
THE UNITED STATES POSTAL SERVICE FOR TEMPORARY
EXTENSION OF GIFT CARD MARKET TEST

(July 1, 2013)

On June 18, 2013, the Postal Service filed a motion requesting that the Commission temporarily extend the Gift Card Market Test set to expire on June 27, 2013 for an additional year.¹ In Order No. 1755, the Commission extended the deadline for filing a response to the Motion until July 8, 2013.² The Order also temporarily extended the Market Test from its original termination date until July 27, 2013. *Id.*

¹ Motion of the United States Postal Service for Temporary Extension of Gift Card Market Test, June 18, 2013 (Motion). Initially, the Postal Service requested an extension through January 31, 2014. *Id.* It then filed an errata to change its request to extend the Market Test through June 27, 2014. Notice of Errata to Motion of the United States Postal Service for Temporary Extension of Gift Cards Market Test, June 27, 2013.

² Order No. 1755, Notice and Order Granting Temporary Extension of Gift Card Market Test, June 21, 2013 (Order No. 1755).

The Public Representative does not have any issue with the merits of the Postal Service's requested extension in this case.³ However, the Public Representative has concerns with the timing of the Motion.

The Commission may grant an extension of a market test if such extension is "necessary in order to determine the feasibility or desirability of a product being tested." 39 U.S.C. 3641(d)(2). The Motion appears to meet the "feasibility or desirability" standard since the Postal Service states that it "needs more time to determine the impact of its efforts to improve sales, as well as the demand for closed loop cards." Motion at 2.

The statute also requires that the Postal Service request an extension of a market test "not later than 60 days before" the market test "would otherwise be scheduled to terminate." 39 U.S.C. 3641(d)(2). However, historically, the Postal Service has never come close to meeting this statutory requirement. This Motion marks the third time that the Postal Service has requested an extension of a market test and the third time that the Postal Service has requested a waiver of the 60-day statutorily required notice period found in section 3641(d)(2). In each case that the Postal Service has asked the Commission to invoke the provisions of section 3641(d)(2), the Postal Service's filing was made less than 60 days prior to the market test's expiration.⁴ Allowing this conduct to continue has the effect of nullifying an express statutory provision.

³ The Public Representative has some concerns with the legality of the full scope of the Gift Card Market Test as discussed in a previous pleading filed in this proceeding. See Comments of the Public Representative, February 4, 2011. This response only addresses issues raised by the requested extension.

⁴ In Order No. 742, the Commission found that this statutory provision was not jurisdictional and could be waived by the Commission. See Docket No. MT2009-1, Order No. 742, Order Granting in Part Temporary Extension of Collaborative Logistics Market Test, June 3, 2011, at 4-5; see also Comments of the Public Representative on Motion for Temporary Extension, May 16, 2011, at 3-4.

In Docket No. MT2009-1 (Collaborative Logistics), the Postal Service missed the 60-day statutory notice provision by 50 days.⁵ In Docket No. MT2011-1 (Alternative Postage for Greeting Cards), the Postal Service missed the 60-day statutory notice provision by 18 days.⁶ In this most recent case, the Postal Service missed the 60-day statutory notice provision by 51 days. Motion at 1. Given this trend, one cannot say that the Postal Service is moving closer to compliance with the statutory notice provision.

Moreover, the Postal Service's justifications for granting a waiver of the 60-day notice provision have become less justifiable. Previously, in the Collaborative Logistics case, the Postal Service asserted that a waiver was warranted due to "ongoing reorganization at Postal Service Headquarters," and that granting a waiver "would not prejudice any party." Collaborative Logistics Motion at 1-2. Similarly, in the Alternative Postage for Greeting Cards case, the Postal Service requested a waiver based on "unforeseen complications associated with Hurricane Sandy and the Postal Service's internal approval processes." See Alternative Postage Motion at 1 n.1. In this proceeding, the Postal Service states that it was "regrettably unable to request an extension" in compliance with the 60-day statutory notice provision, but "does not believe a waiver would prejudice any interested person." See Motion at 2.

Given the Postal Service's track record for market test extension requests, the Public Representative is concerned that, in practice, the Postal Service is treating the statutorily mandated 60 day notice provision as discretionary. The Commission should take appropriate action to ensure that the Postal Service complies with the plain language of the statute and that waiver requests are made only in exceptional circumstances. Such action may include promulgating rules that provide clear guidance

⁵ Docket No. MT2009-1, Motion of the United States Postal Service for Temporary Extension of Collaborative Logistics Market Test, April 26, 2011 (Collaborative Logistics Motion).

⁶ Docket No. MT2011-1, Motion of the United States Postal Service for Temporary Extension of Alternative Postage for Greeting Cards Market Test, November 21, 2012 (Alternative Postage Motion).

as to the criteria that the Commission will use to grant requests to waive this statutory notice provision.

Respectfully Submitted,

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